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IN THE

Supreme Court of the United States

ABIGAIL NOEL FISHER

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF DEAN ROBERT POST AND DEAN MARTHA MINOW AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Amicus Martha Minow is the Morgan and Helen Chu Dean and Professor of Law at Harvard Law School, where she has taught since 1981. *Amicus* Robert Post is the Dean and the Sol & Lillian Goldman Professor of Law at Yale Law School, where he has taught since 2003.[1] Harvard Law School and Yale Law School are respected private educational institutions established in 1817 and 1824, respectively. Deans Minow and Post are filing this brief in their personal capacities, and the views expressed in this brief should not be regarded as the position of their respective law schools.

Both Dean Minow and Dean Post help set policy for the admission of new students at their respective schools, oversee implementation of admissions procedures, and have personally reviewed many applications for admission at their respective institutions during their careers. Both Harvard Law School and Yale Law School have admired and rigorous admissions procedures. Each school assesses each applicant individually and holistically. Each takes into account all aspects of an applicant's achievements and background in attempting to predict accurately an individual's potential.

This form of individualized assessment is consistent with—and indeed, based upon—principles

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part and that no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief are on file with the Clerk in accordance with this Court's Rule 37.3(a).

this Court has recognized and approved. For more than three decades, Harvard and Yale Law Schools have used admissions procedures that treat "each applicant as an individual in the admissions process." *Regents of the Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 317-18 (1978) (opinion of Powell, J.). Both institutions use these resource-intensive admissions procedures to ascertain which applicants are likely to succeed long after they have graduated. The procedures involve "individualized decisions, in which ethnic background plays a part, under a presumption of legality and legitimate educational purpose." *Id.* at 319 n.53 (opinion of Powell, J.). In both schools' admissions programs, "race or ethnic background may be deemed a 'plus' in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats." *Id.* at 317 (opinion of Powell, J.). Neither law school admits students as measured merely by "numbers" derived from standardized testing and grade point averages.

Amici write to urge the Court again to reaffirm these basic principles and the propriety of admissions procedures like those used by the Harvard and Yale Law Schools. As constituent parts of private institutions that accept federal funds, both schools are subject to the strictures of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. As a consequence, their admissions policies and practices may be impacted by this Court's pronouncements about the constitutionally appropriate acknowledgement of race in respondent's admissions procedures.

Harvard and Yale Law Schools have each been successful in selecting and training leaders for the American legal profession. They have done so by carefully evaluating each applicant based on the

entirety of his or her record. Race can be an inescapable part of that record. It is neither feasible nor desirable to offer each applicant an individual assessment without also giving appropriate consideration to race, particularly when applicants themselves deem race to be central to their identities or life experiences. An assessment that ignores what a candidate identifies as a salient feature of his or her experience is neither holistic nor consistent with the dignity of that applicant.

Were this Court altogether to preclude considerations of race from the admissions process, each school would also be disadvantaged in its efforts to select individuals who will produce the most effective classroom experience for all admitted students. A diverse educational experience is essential to training students to succeed in the opportunities and challenges that lawyers must now inevitably confront. Attracting students from all states—indeed, from all over the world—from hundreds of colleges, varied graduate schools, and a wide range of business, government, and service experiences, neither school could plausibly employ a percentage plan of the sort that Texas has mandated. Both schools would find themselves in the untenable position of directing applicants to suppress references to their own race and to censor discussion of any experiences that might reveal their race.

Amici submit this brief to urge the Court to continue to respect the fundamental framework of law school admissions that has served the legal profession so well for decades and that will help ensure that the profession will continue to lead the nation in the future. "In *Fisher [I]*, the Court did not disturb the principle that the consideration of race in admissions is permissible, provided that certain conditions are

met." *Schuette* v. *Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1630 (2014) (plurality). It should leave that principle undisturbed, as it did in the earlier proceedings in this very case.

BACKGROUND

This Court has recognized that "universities, and in particular, law schools, represent the training ground for a large number of our Nation's leaders." *Grutter* v. *Bollinger*, 539 U.S. 306, 332 (2003). "Individuals with law degrees occupy roughly half the state governorships, more than half the seats in the United States Senate, and more than a third of the seats in the United States House of Representatives." *Id.* This "pattern is even more striking when it comes to highly selective law schools." *Id.*[2] Indeed, every current member of this Court attended either Harvard Law School or Yale Law School.

Both schools seek to educate future leaders of the American legal profession. And both schools are fortunate to have large pools of talented applicants from which they can select those students whom they believe have the greatest potential to grow into those leaders. For the class of 2018, Yale Law School

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[2] In 2003, highly selective law schools "account[ed] for 25 of the 100 United States Senators, 74 United States Courts of Appeals judges, and nearly 200 of the more than 600 United States District Court judges," *Grutter*, 539 U.S. at 332, and the pattern remains true today, *see, e.g.*, Jennifer E. Manning, Cong. Research Serv., R43869, *Membership of the 114th Congress: A Profile* 5 (2015), https://www.fas.org/sgp/crs/misc/R43869.pdf ("159 Members of the House (36% of the House) and 54 Senators (54% of the Senate) hold law degrees"); Nat'l Law Journal, *Law School Alumni in Congress* (Jan. 19, 2015), http://www.nationallawjournal.com/id=1202715140642/Law-School-Alumni-in-Congress (listing 20 most attended law schools by members of Congress).

enrolled just 200 students out of 2,809 applicants.[3] That same year, Harvard Law School enrolled 560 students out of 5,207 applicants.[4]

Both schools could entirely fill each entering class with students who have the highest possible Grade Point Averages ("GPAs") and Law School Admission Test ("LSAT") scores. But neither school chooses to do so. In isolation, these "objective" measures cannot successfully identify the future leaders of the bar. Both schools deny admission to more than half of the applicants who have either a 4.0 or greater GPA or a 171 or greater LSAT (98th percentile).

Although GPAs and LSAT scores are certainly relevant, they inevitably reveal only a partial view of an applicant's professional potential and ability positively to influence the educational experience of an entire law school. The objective "numbers" must always be set in the context of an applicant's background and circumstances.

Both Harvard and Yale recognize from long experience that intangible virtues like courage, commitment, leadership, and moral compass are highly relevant to an applicant's potential to succeed in the legal profession. The "numbers" do not identify such virtues, which become visible only when the life story of an applicant is carefully scrutinized in all its complexity. Both schools therefore invest heavily in admissions processes that aspire to undertake such scrutiny. These processes allow each school to admit students it believes are of the highest quality and are

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[3] *See* Yale Law Sch., *Entering Class Profile*, http://www.law.yale.edu/admissions/profile.htm (last accessed Oct. 29, 2015).

[4] *See* Harvard Law Sch., *HLS Profile and Facts*, http://hls.harvard.edu/dept/jdadmissions/apply-to-harvard-law-school/hls-profile-and-facts/ (last accessed Oct. 29, 2015).

most likely to become successful lawyers and leaders in the American legal profession.

The application processes at both schools share certain common features. Each application includes a personal statement, letters of recommendation, a list of professional experiences, an academic transcript, and an LSAT score. At both schools, the admissions office reviews every individual application and essay and can directly reject less competitive applications. The admissions offices then distribute a subset of applications to faculty members, who assess each application according to its individual strengths and weaknesses, with the missions of their respective school in mind. Finally, both schools collect feedback from faculty to make final decisions about who to admit and who to place on a waiting list.[5]

Each school assesses applicants individually, based upon their unique experiences and promise. We do so for two reasons. The first is that intangible qualities are often apparent only when an applicant is given the opportunity to express his or her own personal story. The quality of our students would be immeasurably poorer if we were to select them only "on the numbers."

The second is that our pedagogical responsibility as educators is to select an entering class which, when assembled together, will produce the best possible

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[5] Each school's application process also has a few unique features. Once Yale Law School distributes applications to faculty, three faculty members individually review each application and rate it on a scale of two to four. At Harvard Law School, the admissions office works with faculty to review and rate applications. At least two people, and sometimes as many as five, read every application. In addition, Harvard Law School conducts candidate interviews by invitation before admitting any student as part of the evaluation process.

educational experience for our students. Law students learn not merely from their faculty or their books, but also from each other. The hours of peer debate among individual students and within study groups inevitably contribute at least as much to the education of law students as does time spent in class. Each year, therefore, we aspire to assemble a student body in which the potential for students to learn from and with each other is maximized. This requires selecting a class in which students have different points of view, are committed to diverse aspirations, and have complementary strengths.

Rigorous individualized assessments do *not* in any way utilize numerical matrices, formulas, guidelines, or set-asides for any groups, including children of alumni or individuals of color or other minority status. Stated simply, race is not considered in any systematic way by either law school. Race is not quantified, nor does it have a fixed role in the qualitative assessment of applications.

Yet race cannot be excluded as relevant to the effort to obtain a full appreciation of an applicant's perspectives, accomplishments, and leadership potential. It is neither feasible nor desirable to ignore race in the evaluation of an applicant's file. To do so would be inconsistent with the aspiration to have a holistic, individualized assessment. It would be as arbitrary and misleading as ignoring an applicant's college major or the quality of an applicant's undergraduate training or whether English is an applicant's first language. Careful, respectful, individualized consideration is therefore necessary to select the best students who together will create the most effective educational environment.

SUMMARY OF ARGUMENT

At the core of the admissions processes of Harvard and Yale Law Schools is respect for the individual. Both schools perform an individualized, holistic, and careful assessment of each applicant, with a focus on understanding the complex forces, struggles, and experiences that illuminate an applicant's achievements, perspectives, and potential. This intensive process serves compelling educational interests.

To select the most meritorious applicants, it is necessary to evaluate intangible aspects of their character. This same evaluation process is also indispensable to the creation of a rich and dynamic learning environment. Each school uses individualized assessments to assemble a broadly diverse student body that can robustly debate ideas inside and outside the classroom and from an array of perspectives that are essential for legal education. A diverse student body is also of great pragmatic value in preparing students for the practice of law in today's increasingly globalized and heterogeneous economic world.

If this Court were to interpret the Fourteenth Amendment in a manner that precluded considerations of race, even in the context of truly individualized assessments, the admissions processes of both Harvard and Yale Law Schools could be severely impaired. Were Title VI to be read to prevent us from recognizing the race of applicants, even when race is unquestionably a salient aspect of an applicant's own identity and story, we could not conduct holistic evaluations and our law school classes would be impoverished. Not only would such a prohibition exclude relevant aspects of individual files, but it would also censor applicants' self-understandings.

Considering race as part of an individualized, broad-based process that accounts for all relevant factors is entirely consistent with the Fourteenth Amendment. Just as classifications that reduce "an individual to an assigned racial identity," *Parents Involved in Cmty. Sch.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 795 (2001) (Kennedy, J., concurring in part and concurring in the judgment), are inconsistent with the dignity of persons, rules that would force institutions entirely to ignore what an individual has to say about his or her own race would be incompatible with the respect that each person is due.

In our admissions process, we invite applicants to share their personal and unique stories. We want applicants to tell us what aspects of the world they find most important to them. The dignity of our applicants would be deeply offended if the Constitution—and, similarly, if Title VI—were to be interpreted to prohibit applicants from communicating the meaning of race in their own lives.

A constitutional rule that would prohibit all considerations of race would also have severe adverse effects. It would effectively force both schools either to censor the essays of applicants or to abandon the very process of individualized assessment that has heretofore been at the core of our admissions procedures. It would upset our substantial reliance interests on admissions policies designed to comply with the holdings of *Bakke*, *Grutter*, and *Fisher I*. The educational consequences would be devastating. The Court should not now inflict such an injury on the admissions processes of this nation's professional schools and on the pathways they afford to professional service.

ARGUMENT

I. HOLISTIC EVALUATIONS SERVE A COMPELLING EDUCATIONAL INTEREST IN SELECTING THE BEST APPLICANTS WHO TOGETHER WILL CREATE THE BEST EDUCATIONAL ENVIRONMENT.

Harvard and Yale Law Schools—and other educational institutions with similar missions—have found it necessary to consider each applicant individually in order to maximize our chance of identifying and training the leaders of tomorrow. We believe that the process of individualized assessment enables us to select the best applicants and to establish the pedagogical atmosphere that is most conducive to preparation for serving as a lawyer in a diverse society.

A. Holistic Consideration Is Necessary To Select The Most Meritorious Applicants.

Numerical qualifications, like GPA and LSAT scores, are often useful in making threshold determinations of an applicant's academic abilities. Yet essential dimensions of character and commitment, and even candidates' capacities to learn and engage with novel material, are not revealed by simple test scores.

An admissions process must be able to distinguish students who can only memorize facts and apply existing legal principles, from students who can understand the deep social policies and implications of the law. The latter kind of student is more likely to contribute to classroom and hallway discussions, and to develop into a leader of the legal profession. The vital challenge of the admissions process at Harvard and Yale Law Schools is to distinguish one kind of student from the other.

We try to meet this challenge by examining the entire record of applicants. We hope to identify individual qualities like curiosity, flexibility, judgment, responsiveness, and the ability to move easily between so-called big picture concerns and detailed analysis. We look for the ability to overcome obstacles, and we prize the strength that such triumphs evidence and produce. We believe that these traits are helpful in predicting the future success of students and graduates. Test scores and grades do not capture these essential qualities.

Numbers without context say little about character. They do not reveal the drive or determination to become a leader or to use the advantages of one's education to give back to society. Harvard and Yale Law Schools can accept only a small number of applicants, and we each feel responsible to accept students who are committed not only to preserving and advancing the practice and study of law, but also to ensuring justice and providing leadership in their communities, this nation, and the world.

In other countries, elite institutions may select students entirely by standardized test scores. But this has never been true of post-graduate institutions in the United States. We know of no American law school that selects students merely on the basis of numerical scores.[6] Character, and not merely ability, matters to the practice of law.

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[6] Indeed, the American Bar Association's accreditation standards explicitly state that schools should "not use the LSAT score as a sole criterion for admission." Am. Bar Ass'n, *2015-2016 Standards and Rules of Procedure for Approval of Law Schools* app. 2, at 191 (2015). The ABA warns that "while LSAT scores serve a useful purpose in the admission process, they do not measure, nor are they intended to measure, all the elements important to success at individual institutions." *Id.* Much less

Character, which includes integrity, compassion, tenacity, courage, and resilience, is most tellingly revealed in how persons respond to the challenges they face. We use a holistic review process because we seek to discern the character of applicants, which can be revealed in experiences such as military service; prior success in business, nonprofit advocacy, journalism, or engineering; overcoming disadvantage or disappointment; or a demonstrated ability to engage and interact successfully with people from different communities and backgrounds (*e.g.*, including racial, religious, political, economic, or national origin). The individualized assessment of character is our best hope for identifying applicants whom we believe will lead our profession and our world in the decades to come.

B. Holistic Consideration Is Necessary To Create The Best Educational Environment.

The individual assessment of each applicant is also necessary to create the best possible educational atmosphere. This is true for two reasons.

1. Student Body Diversity Has Significant Pedagogic Value.

"The atmosphere of 'speculation, experiment and creation'—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body." *Bakke*, 438 U.S. at 312 (opinion of Powell, J.). This Court has accordingly held that a public law school has "a compelling interest in attaining a diverse student body." *Grutter*, 539 U.S. at 328. The same is true for a private law school.

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can those scores indicate how an individual will perform after graduation.

A diverse student body is as important today as it was in 1976 when *Bakke* was decided. Two years ago, the Court reaffirmed that "[t]he attainment of a diverse student body . . . serves values beyond race alone, including enhanced classroom dialogue and the lessening of racial isolation and stereotypes." *Fisher* v. *Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2418 (2013) (*Fisher I*). There is no reason to retreat from that recognition.

Our experience as educators at Harvard and Yale Law Schools confirms the compelling pedagogical interest in diversity. Our schools value diversity along a number of dimensions, including veteran status, geographical origin, undergraduate institution, socioeconomic background, graduate or professional training, religious background, work experience, socioeconomic status, political and cultural perspective, nationality, gender, race, and sexual orientation.[7] A diverse student body contributes to the quality of discussion, both inside and outside the classroom, on wide-ranging topics like interracial adoption; freedom of expression and hate speech; environmental justice; marriage regulation; criminal justice; and employment discrimination, to name just a few. Students from different backgrounds will bring different presumptions and aspirations to bear on these and innumerable other equally important and

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[7] This approach also comports with the accreditation requirements that the American Bar Association has had in place for decades. Currently, the standards require law schools to demonstrate "a commitment to providing full opportunities for the study of law and entry into the profession by members of underrepresented groups, particularly racial and ethnic minorities, and a commitment to having a student body that is diverse with respect to gender, race and ethnicity." Brief of American Bar Association as *Amicus Curiae* at 2-5, *Fisher* v. *Univ. of Tex. At Austin*, 133 S. Ct. 2411 (2013) (No. 11-345).

provocative topics. The clash of these perspectives will enrich the educational experience of all.

The educational environments of Harvard and Yale Law Schools are immeasurably enhanced because we select students whom we expect will facilitate hard and thoughtful discussions of controversial topics. We structure our admissions processes to maximize the diversity of views and experiences that our students will encounter. It almost certainly would be mutually beneficial for students raised in Catholic schools, Yeshivas, and madrassas to encounter each other, because each will come away with an enlarged perspective on the law and on themselves. A national leader of the American bar, if possible, ought to know what life looks like from the perspective of those who have grown up in Mississippi, in South Dakota, in Harlem, or in Delhi.

The racial backgrounds and experiences of our students are without doubt relevant to this educational diversity. See *Parents Involved*, 551 U.S. at 798 (Kennedy, J., concurring in part and concurring in the judgment) (discussing "the important work of bringing together students of different racial, ethnic, and economic backgrounds"). An important benefit of racial diversity is its capacity to illuminate varied or conflicting viewpoints within given racial groups. Such diversity helps overcome stereotypes and superficial assumptions about human behavior, perception, and social meaning. See *Fisher I*, 133 S. Ct. at 2418; *Grutter*, 539 U.S. at 330.

Imagine for example a discussion about the constitutionality of statutes prohibiting cross burning. The different opinions in *Virginia* v. *Black*, 538 U.S. 343 (2003), explicitly invoke the historically distinct perspectives of different groups. See, *e.g.*, *id.* at 388-95 (Thomas, J., dissenting) (explaining the cultural

meaning of cross burning and why it is understood by African-Americans and other minority groups as "a threat and a precursor of worse things to come"). Discussion of this topic in a law school, whether in class or over coffee, would be impoverished without the full spectrum of relevant perspectives. Analogously, debate over environmental waste disposal would be enlivened and enriched if those participating in the discussion include students with prior experience as environmental engineers; students with prior experience in municipal zoning; and students raised in poor communities situated near waste disposal sites.

2. Student Body Diversity Is Important In Preparing Students For The Practice Of Law.

A diverse student body also provides important practical benefits in legal training. As this Court recognized in 1950:

> [A]lthough the law is a highly learned profession, we are well aware that it is an intensely practical one. The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned.

Sweatt v. *Painter*, 339 U.S. 629, 634 (1950).

The intellectual ferment fostered by a diverse student body is valuable not only in training students to become excellent advocates, but also in preparing future lawyers for the practical challenges that they will undoubtedly face in their careers. Alumni from Harvard and Yale Law Schools include not only

federal and state judges and legislators, but also, *inter alia*, senior military officers, mayors, foreign heads of state, leaders of global law firms, corporate executives of Fortune 500 companies, and chief executives of leading civic and nonprofit organizations. We have concluded that it is necessary to expose students "to widely diverse people, cultures, ideas, and viewpoints," *Grutter*, 539 U.S. 330, so that we can properly train them for these remarkable careers. We have also found that exposure to a diverse student body is highly advantageous for more traditional legal practice. Clients come from many backgrounds and a legal education in a diverse environment prepares lawyers to serve all clients, not just those with whom they happen to share common characteristics.

The Court in *Grutter* cited evidence submitted by various educational and business *amici* showing that exposing students "to widely diverse people, cultures, ideas, and viewpoints" "'better prepares students for an increasingly diverse workforce and society,'" and that it confers "skills needed in today's increasingly global marketplace." *Id.* The increasing globalization of legal practice demands that our alumni be able to work with clients and colleagues who are themselves increasingly diverse. Even putting aside the demands of internationalization, the 2010 Census demonstrates the growing racial and ethnic diversity of the U.S. population. *See* Karen R. Humes et al., 2010 Census Briefs, *Overview of Race and Hispanic Origin: 2010*, at 22 (Mar. 2011), http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf.

By the same token, there is no shortage of studies confirming that "continued economic progress hinges on the ability to effectively integrate minority consumers into the mainstream of American business—both as employees as well as

entrepreneurial partners." Bos. Consulting Grp., *The New Agenda for Minority Business Development* 7 (June 2005), http://www.kauffman.org/uploaded files/minority_entrep_62805_report.pdf; see also Leonard Greenhalgh & James H. Lowry, *Minority Business Success: Refocusing on the American Dream* 14 (2011) ("The United States cannot restore its national competitive advantages unless it fosters the survival, prosperity, and growth to scale of its minority businesses." (emphasis omitted)). Another study reported these "startlingly consistent" findings:

> for companies ranking in the top quartile of executive-board diversity, [returns on equity] were 53 percent higher, on average, than they were for those in the bottom quartile. . . . [and earnings before interest and taxes] margins at the most diverse companies were 14 percent higher, on average, than those of the least diverse companies . . . .

Thomas Barta et al., *Is there a payoff from top-team diversity*, McKinsey Quarterly (Apr. 2012), https://www.mckinseyquarterly.com/Is_there_a_payoff_from_top-team_diversity_2954.[8] And Americans un-

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[8] *See* Orlando C. Richard et al., *Cultural Diversity In Management, Firm Performance, and the Moderating Role of Entrepreneurial Orientation Dimensions*, 47 Acad. Mgmt. J. 255, 263 (2004); *see also* Sylvia Ann Hewlett et al., *How Diversity Can Drive Innovation*, Harv. Bus. Rev. (Dec. 2013) (reporting "new research [that] provides compelling evidence that diversity unlocks innovation and drives market growth"); Cedric Herring, *Does Diversity Pay?: Race, Gender, and the Business Case for Diversity*, 74 Am. Soc. Rev. 208, 219 (2009) ("diversity is associated with increased sales revenue, more customers, greater market share, and greater relative profits"); Alison Kenney Paul et al., *Diversity As An Engine of Innovation*, 8 Deloitte Rev. 108, 111 (2011) ("Regardless of the group, it is hard to form

derstand this trend: over two-thirds agree that "[a] bigger, more diverse workforce will lead to more economic growth" and that "[d]iverse workplaces and schools will help make American businesses more innovative and competitive." Ctr. for Am. Progress, *Building an All-in Nation* 5 (Oct. 2013), https://cdn.americanprogress.org/wp-content/uploads/2013/10/AllInNationReport.pdf.

In our educational judgment, law students who pursue careers both within and outside the legal profession will inevitably interact with increasingly diverse clients, managers, and colleagues. Our commitment as educators is to create the educational environments best suited to prepare our students to succeed in this world. In our view, diversity is a critical ingredient of better educational outcomes.[9] Diverse teams are better at solving a variety of problems when compared with homogeneous groups,

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a brand relationship unless you have people that come from those cultures and ethnicities that can connect.").

[9] Deborah Son Holoien, *Do Differences Make a Difference? The Effects of Diversity on Learning, Intergroup Outcomes, and Civic Engagement* 15 (Sept. 2013), https://www.princeton.edu/reports/2013/diversity/report/PU-report-diversity-outcomes.pdf ("with practice and increased exposure, people can start to reap the learning, intergroup, and civic benefits associated with interacting with diverse groups"); Patricia Gurin et al., *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 Harv. Educ. Rev. 330 (2002); *see also* Samuel R. Sommers et al., *Cognitive effects of racial diversity: White individuals' information processing in heterogeneous groups*, 44 J. Experimental Soc. Psychol. 1129 (2008) (white individuals who expected to discuss a race-relevant topic with a racially diverse group exhibited better comprehension of topical background readings than whites assigned to all-white groups).

even when rated higher on standard ability measures.[10]

II. THE FOURTEENTH AMENDMENT DOES NOT PROHIBIT CONSIDERING RACE AS PART OF A HOLISTIC, INDIVIDUALIZED ASSESSMENT.

It has frequently been observed that at "'the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial [or] sexual . . . class.'" *J.E.B.* v. *Ala. ex rel. T.B.*, 511 U.S. 127, 152-53 (1994) (Kennedy, J., concurring); see also *Missouri* v. *Jenkins*, 515 U.S. 70, 120-21 (1995) (Thomas, J., concurring) ("At the heart of this interpretation of the Equal Protection Clause lies the principle that the government must treat citizens as individuals, and not as members of racial, ethnic, or religious groups."). "One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities." *Rice* v. *Cayetano*, 528 U.S.

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[10] *See generally* Katherine W. Phillips, *How Diversity Makes Us Smarter*, 311 Sci. Am. (Sept. 16, 2014), http://www.scientificamerican.com/article/how-diversity-makes-us-smarter/; Scott E. Page, *The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools, and Societies* 319-28 (2007); Katherine W. Phillips et al., *Surface Level Diversity and Decision-Making in Groups: When Does Deep-Level Similarity Help*, 9 Group Processes & Intergroup Rel. 467, 469 (2006) (diversity "serves to legitimize the surfacing of unique information"); Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. Personality & Soc. Psychol. 597, 606 (2006) (heterogeneous mock juries "deliberated longer and considered a wider range of information" than racially homogenous groups).

495, 517 (2000); see also *Parents Involved*, 551 U.S. at 746 (opinion of Roberts, C.J.).

This conviction shapes the Constitution's mandate in evaluating the use of race in academic admissions: the process must "'ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application.'" *Fisher I*, 133 S. Ct. at 2420. Based on this fundamental principle, this Court has endorsed holistic, individualized assessments in both *Bakke* and *Grutter*, and our law schools assiduously undertake precisely this sort of assessment. We recognize the dignity of each individual applicant and evaluate him or her accordingly. A rule that would forbid us to consider race in the admissions process would undermine this dignity by censoring the voices and experiences of individual applicants.

But even with holistic and individualized assessments in place, this Court has explained that a university's use of race in admissions must be "'necessary' . . . to achieve the educational benefits of diversity." *Fisher I*, 133 S. Ct. at 2420 (quoting *Bakke*, 438 U.S. at 305). Diversity and the benefits that flow from it are "complex" concepts, not readily reduced to formulas or numerical assessment. *Id.* at 2418. Because it is "the business of a university . . . to provide that atmosphere which is most conducive to" its academic vision, *id.*, we have grappled with these issues on a regular and ongoing basis. We have concluded that the optimal educational atmosphere is unattainable without the ability to consider race in admissions.

A. Consideration Of Race As Part Of A Holistic, Individualized Evaluation Is Consistent With The Dignity Of Each Applicant.

This Court has recognized that race is "'one element in a range of factors that a university properly may consider in attaining the goal'" of a diverse student body "essential to its educational mission." *Grutter*, 539 U.S. at 324, 328. Such consideration of race is permissible if it is not used to "'insulat[e] the individual from comparison with all other candidates for the available seats,'" and is instead "used in a flexible, nonmechanical way" as part of a "truly individualized consideration." *Id.* at 334. An individualized admissions process does not use race as a quota or set-aside. In no way does it treat applicants as mere "components of a racial . . . class." *J.E.B.*, 511 U.S. at 152-53 (Kennedy, J., concurring) (internal quotation marks omitted). The whole point of an individualized application process is to use essays, references and test scores to allow each applicant to tell his or her own particular story and to display his or her particular talents. Such a process seeks to overcome stereotypes and classifications.

It does not "demean[] the dignity and worth of" an applicant, *Rice*, 528 U.S. at 517, to listen to what he or she has to say. We find that our applicants often believe that race is an important aspect of their own personal experience. There is nothing intrinsically stigmatizing or demeaning about applicants seeking to understand their own racial identities. Cf. *Jenkins*, 515 U.S. at 114 (Thomas, J., concurring). Race is relevant not only because it enables us to hear each applicant's own perspective, but also because it enables us to construct each entering class to be educationally optimal. Race is considered in the same

way, and for the same purposes, as a multitude of other personal characteristics, such as prior work experience, civic service, athletic achievement, military service, socio-economic background, and geographic origin.

To use race in this way does not offend the Equal Protection Clause. Indeed, the dignity of applicants would be offended by a rule that would prohibit consideration of race (and only race) from an otherwise fully individualized, holistic admissions process. Harvard and Yale Law Schools ask applicants to submit personal statements that discuss their circumstances and history. It would be deeply disrespectful to our applicants to refuse to acknowledge their statements when, and only when, applicants discuss the pertinence of race to their own lives.

We accord dignity to persons when we listen to what they have to say. It belittles applicants to invite their self-presentations and then to deliberately ignore aspects of their personal accounts that they believe to be important. It demeans them to suppress what they regard as significant dimensions of their records and their potential contributions to our law schools. And it is inconsistent with everyone's constitutional right "to define and express their identity," *Obergefell* v. *Hodges*, 135 S. Ct. 2584, 2593 (2015), and incompatible with the respect we owe our applicants to demand that they comply with the blanket assumption that race does not matter to them.

Of course some applicants may consider race to be insignificant in their lives. But we know from experience that many other students understand race as a fundamental dimension of their identities. If Title VI were to prohibit our schools from listening to

and considering such intimate and personal perspectives on the lives of our applicants, the statute would be in serious tension with the "personal dignity and autonomy" that lies at the heart of "the liberty protected by the Fourteenth Amendment." *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 851 (1992); see also *Obergefell*, 135 S. Ct. at 2598-2605. The Equal Protection Clause, no less than the Due Process Clause, celebrates an individual dignity that cannot be consistent with such an outcome.

The command of the Equal Protection Clause that government "must treat citizens as individuals, not as simply components of a racial . . . class," *J.E.B.*, 511 U.S. at 152-53 (Kennedy, J., concurring) (internal quotation marks omitted), should not be understood to forbid law schools from considering aspects of applicants' histories or personal identities that they wish to communicate.

B. Holistic Consideration Of All Aspects Of Identity, Including Race When Identified, Is Necessary To Achieve The Benefits Of Diversity.

Our schools have concluded that holistic, individualized assessments are essential to the goal of assembling the best possible student body for the advancement of our educational missions. This goal would not be possible to achieve were we to be required to suppress applicants' race while conducting individualized assessments. The diversity we seek simply cannot be replicated through "race neutral alternatives." *Fisher I*, 133 S. Ct. at 2420. To understand the unique personality of each candidate, we need to appreciate the complexity of his or her particular experience. We need to recognize his or her unique experience of socio-economic disadvantage or advantage, early familial circumstances, or particular

medical condition. It matters to us whether an applicant did not speak English until middle school or grew up in a neighborhood in which no one attended college. It matters to us if the individual experienced interactions with police in which nationality, gender, or income played a role. Race can be no less important a dimension of individual experience; it can be no less essential to a careful evaluation of an applicant's achievements and prospects. The racial background of a person is not like a hat that can be taken on or off. It cannot be torn from the fabric of his or her identity.

Were we to be compelled to ignore race, we would be prevented from evaluating all that racial identity might mean to a individual person. We would be precluded from fully appreciating an applicant's potential for growth and leadership. To some applicants, race may not matter at all. To others, however, it may be fundamental. We do not prejudge this issue. We affirm merely that enforced colorblindness will cripple the capacity of our admissions processes fully to assess the potential of many applicants. And it would severely injure our efforts to ensure that classrooms and study groups will generate the robust debate that is essential to legal and policy analysis. Were we barred from appreciating this one element of our applicants' identities, our efforts to create a student body with optimal balance and richness would be undermined.

For our law schools, therefore, we do not think any "workable race-neutral alternatives would produce the educational benefits of diversity" that our holistic process yields. 133 S. Ct. at 2420. Our "nuanced, individual evaluation of school needs" compels us to offer admission to "students [who] [a]re considered for a whole range of their talents" and attributes, "with

race as . . . one consideration." *Parents Involved*, 551 U.S. at 790, 793 (Kennedy, J., concurring in part and concurring in the judgment). Eliminating the ability to include race in our process would "require a dramatic sacrifice of diversity," would censor our applicants' own voices, and would erode our "educational autonomy." *Grutter*, 539 U.S. at 329, 340.

As a practical matter, it is not clear to us how admissions officers and faculty reviewers can ignore race and yet nevertheless conduct holistic evaluations. Essays are a critical component of the application process at law schools such as Yale and Harvard, and it is not uncommon for the personal statement of minority applicants to explain the ways in which race has shaped their lives or perspectives. Applicants' references are also an essential component of their admissions files, and reference letters frequently mention race in explaining how an applicant has demonstrated positive qualities and skills. We do not understand how such discussion could possibly be suppressed or ignored.

Consider the practical alternatives. We might instruct applicants not to mention their race in their personal essays; we might redact any explicit or implicit references to race that nevertheless appear in applicant essays; we might advise reviewers to excise race from their letters of recommendation. We might direct faculty to ignore any inferences they might draw from an application file about the relevance of race.

These censorial approaches are deeply unattractive. They would not only deprive us of valuable and relevant information, but they would also stifle applicants, recommenders, and faculty. To take such steps would seem fundamentally at odds with our nation's traditions of freedom of expression and academ-

ic freedom. And to what end: to make us colorblind to a world full of color? Indifferent to a world of difference? The Constitution does not require such a contrivance.

III. A RULING THAT RACE CANNOT BE CONSIDERED IN A HOLISTIC ASSESSMENT OF APPLICANTS WOULD UPSET SETTLED RELIANCE INTERESTS AND HAVE NEGATIVE CONSEQUENCES.

A ruling that race can no longer be part of a holistic, individualized assessment of applicants to law schools would upset decades of practice by Harvard and Yale Law Schools, as well as by countless other educational institutions, that have built their admissions processes in reliance on the effective holding of *Bakke*, and have confirmed and refined these processes in light of experience, research, and pedagogical evidence. Such a ruling, moreover, would likely cause significant harm to both institutions.

A. Principles Of *Stare Decisis* Weigh Heavily Against A Rule Of Absolute "Colorblindness" In Admissions Processes.

Stare decisis "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact." *Vasquez* v. *Hillery*, 474 U.S. 254, 265-66 (1986). While not "an inexorable command," *stare decisis* is "the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne* v. *Tennessee*,

501 U.S. 808, 827-28 (1991). "[E]ven in constitutional cases, the doctrine carries such persuasive force that [the Court] ha[s] always required a departure from precedent to be supported by some special justification." *Dickerson* v. *United States*, 530 U.S. 428, 443 (2000) (internal quotation marks omitted). And it "has special force when legislators or citizens 'have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response.'" *Hubbard* v. *United States*, 514 U.S. 695, 714 (1995) (opinion of Stevens, J.).

This Court has long held that race can be a permissible factor in schools' admissions decisions. Justice Powell's separate opinion in *Bakke*, issued more than three decades ago, set out the law regarding race-conscious admissions. As the Court recognized in *Grutter*, "[p]ublic and private universities across the Nation have modeled their own admissions programs on Justice Powell's views on permissible race-conscious policies." 539 U.S. at 323 (citations omitted). And "[i]n *Fisher [I]*, the Court did not disturb the principle that the consideration of race in admissions is permissible, provided that certain conditions are met." *Schuette*, 134 S. Ct. at 1630 (plurality).

For over 35 years, Harvard and Yale Law Schools have understood that they could, and believe that they should, employ admissions processes that "consider race or ethnicity . . . flexibly as a 'plus' factor in the context of individualized consideration of each and every applicant." *Grutter*, 539 U.S. at 334 (discussing scope of Justice Powell's controlling opinion in *Bakke*). As recipients of federal funds potentially affected by this Court's constitutional

interpretations under Title VI of the Civil Rights Act, Harvard and Yale Law Schools have relied on these principles in fashioning resource- and time-intensive processes designed both to identify students who possess the potential to become future leaders and to enrich their own institutional educational environments. Implementing these policies has required dozens of admissions officers and faculty reviewers, multiple rounds of evaluations, and significant expenditures of time and money. In undertaking such review processes, Harvard and Yale Law Schools have determined that they cannot isolate race and exclude it from the otherwise comprehensive, individualized assessments necessary to fulfill their educational missions.

Thousands of other public and private educational institutions have similarly understood and relied upon *Bakke*, *Grutter*, and *Fisher I*. Several other *amici* in this case demonstrate how the whole structure of our nation's higher education system has been built upon this Court's clear holdings about race-conscious admissions. See, *e.g.*, Brief of California Institute of Technology et al. (describing, on behalf of a coalition of 10 major private universities, how undergraduate institutions have placed substantial reliance on *Bakke* and *Grutter* in shaping admissions policies). Indeed, the modern legal profession itself rests on a foundation in schools and policies that depend, in no small part, upon decisions like *Bakke* and *Grutter*. See Brief of the American Bar Association (detailing the structural impacts of race-conscious admissions policy on the legal profession over several decades).

To overrule or reorient these precedents now "would dislodge settled rights and expectations," *Hubbard*, 514 U.S. at 714 (opinion of Stevens, J.),

upon which law schools and universities have come to depend. It would effectively require us to develop new admissions policies and procedures that almost certainly cannot replicate the admissions success the law schools and the students learning in the schools have benefitted from during the past 35 years. The risk that these new procedures will select inferior students, and create a less robust educational environment, is virtually certain. The principles of *stare decisis* strongly counsel against imposing these social harms.

Nothing has changed in the dozen years since *Grutter* or in the two-plus years since *Fisher I* that would give rise to a "special justification," *Dickerson*, 530 U.S. at 443, for departing from traditional *stare decisis* requirements. To the contrary, the value of diversity has even stronger empirical support today, see *supra* at 15-19 & nn.8-10, and the growing complexity and interconnectedness of the world makes the case for diversity stronger even still. As in *Fisher I*, there is no reason to revisit prior holdings in a case where the parties have not even asked the Court to do so.

B. Prohibiting Consideration Of Race Would Lead To Numerous Undesirable Consequences.

In addition to upsetting settled reliance interests, a ruling that the Equal Protection Clause bars considerations of race in admissions decisions would adversely affect the educational missions of institutions like the Harvard and Yale Law Schools.

As small, private institutions, neither school can employ the type of "top ten percent" plan that governs admissions at the University of Texas. As this Court recognized in *Grutter*, the use of "percentage plans,"

like the one used in Texas for undergraduate admissions, can preclude professional schools "from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university." 539 U.S. at 340. Law schools like Harvard and Yale would thus be put to a choice: either admit "by the numbers" alone or engage in a truncated individualized consideration that forbade applicants and recommenders from discussing, and our faculty and staff from considering, important aspects of applicants' lives, experiences, and goals that happen to relate to race.

The effort to purge admissions processes of all references to race would have the ironic effect of rendering a truly individualized assessment impossible for many applicants. Requiring schools to ignore a factor that is often inextricable from an applicant's formative life experiences would perversely penalize some applicants in the name of equal protection. It would uniquely preclude them from relying on an aspect of their lives that may be essential to a full appreciation of their perspectives, personal accomplishments, and future potential.

For some students, being Caucasian may be an important part of their life story, as, for example, if a white applicant has chosen to focus on law because of the personal experience of working to desegregate a school or a club or a sports team. A Cambodian student may submit a personal essay describing the difficulties of being typecast as a "model minority." The racial dimensions of personal identity might be especially salient for many African-American and Hispanic applicants who have experienced and overcome hurdles that others have not faced. The ultimate effect of purging admissions processes of all reference

to race will not be a colorblind Constitution; it will be a Constitution that disadvantages racial minorities.

The effort to cleanse admissions processes of all mention of race would also almost assuredly invite lawsuits from disappointed applicants who would claim that they had been denied admission because of improper considerations of race. Such suits will be difficult and costly to defend. They will create perverse incentives for schools to return to the legally safe harbor of admitting students entirely "on the numbers," even though these numbers neither capture the character of applicants nor are free of racial impact. It is hard to imagine a less attractive outcome for American higher education or the legal profession, and we urge the Court to avoid that result and adhere to the course set out in *Bakke*, *Grutter* and *Fisher I*.

CONCLUSION

For the foregoing reasons, this Court should adhere to the oft-accepted constitutional principle that recognizes the need of educational institutions to maintain admissions procedures that undertake individualized, holistic evaluation of applicants, including the race of those applicants.

Respectfully submitted,

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